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February 27, 2004

The Honorable Bruce Duke
Executive Director
Public Service Commission of SC
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Joint Petition for Arbitration of NewSouth Communications, Corp., NuVox Communications, Inc., KMC Telecom V., Inc., KMC Telecom III LLC, and Xspedius [Affiliates] of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended
Docket No. 2004-42-C

Dear Mr. Duke:

Enclosed for filing are the original and fifteen copies of BellSouth Telecommunications, Inc.'s ("BellSouth's") Motion to Sever or to Adopt Procedural Requirements. By copy of this letter, I am serving all parties of record with a copy of this Motion as indicated on the attached Certificate of Service.

The federal Telecommunications Act of 1996 ("the Act") contemplates that arbitrations will be between a single CLEC and a single incumbent – it does not contemplate a joint filing such as the one at issue in this proceeding. At the same time, such a joint filing is not expressly prohibited by the Act. Given this, there may well be circumstances in which it would be appropriate for the Public Service Commission of South Carolina ("Commission") to consolidate properly filed, separate arbitrations into a single proceeding. On its face, however, the Joint Petition does not present such a case.

First, the proper procedure for seeking a joint proceeding would be for each of the four CLECs to file a separate petition and then move for consolidation. Rather than taking this proper course, the Joint Petitioners have taken the liberty of inappropriately filing a petition jointly on behalf of multiple CLECs. Second, a proper Motion for Consideration should contain sufficient facts to allow the Commission to determine whether the requested consolidation would be in the interest of administrative economy, and would otherwise result in a more efficient resolution of the issues than would separate proceedings. The Petitioners have

not only failed to file such a Motion, they have failed to make a sufficient showing to support consolidation. Finally, the Joint Petition raises several serious procedural concerns that should be clearly addressed if this proceeding is to continue on a joint basis.

Thus, for the reasons set forth in the attached Motion, BellSouth respectfully requests the Commission to either: (1) sever this matter into four separate proceedings; or (2) adopt procedural requirements to ensure that efficiency and administrative economy are served, rather than hindered, by allowing the Petitioners to proceed jointly.

Sincerely,

Patrick W. Turner

Enclosures

cc: John J. Pringle, Jr., Esquire
John J. Heitmann, Esquire
F. David Butler, Esquire

529038

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In the Matter of Joint Petition for Arbitration of NewSouth Communications, Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended	)	Docket No. 2004-42-C

BELLSOUTH TELECOMMUNICATIONS, INC. 'S MOTION TO SEVER OR TO ADOPT PROCEDURAL REQUIREMENTS

Arbitrations such as the instant proceeding are filed pursuant to Section 252 of the federal Telecommunications Act if 1996 ("the Act"). The Act contemplates that arbitrations will be between a single CLEC and a single incumbent. For example, Section 252(b)(4)(B) provides that "the State Commission may require the petitioning party and the responding party to provide such information as may be necessary for the State Commission to reach a decision on unresolved issues." Nevertheless, the above-captioned arbitration has been filed jointly by four unaffiliated CLECs (NewSouth, KMC, NuVox and Expedius). Clearly, the Act does not contemplate this type of joint filing. At the same time, such a joint filing is not expressly prohibited by the Act. Given this, there may well be circumstances in which it would be appropriate for the Public Service Commission of South Carolina ("Commission") to consolidate properly filed, separate arbitrations into a single proceeding. On its face, however, the Joint

Petition does not present such a case. Thus, for the reasons set forth below, BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests the Commission to either: (1) sever this matter into four separate proceedings; or (2) adopt procedural requirements to ensure that efficiency and administrative economy are served, rather than hindered, by allowing the Petitioners to proceed jointly.

I. THE JOINT PETITIONERS HAVE NOT FOLLOWED APPROPRIATE PROCEDURE AND HAVE NOT MADE A SHOWING SUPPORTING A CONSOLIDATED PROCEEDING.

The Joint Petition suffers from two significant procedural infirmities. First, the proper procedure for seeking a joint proceeding would be for each of the four CLECs to file a separate petition and then move for consolidation. This is clear from the Commission's procedural regulations, which provide that "[t]he Commission, upon its own motion or upon motion by a party, may order two or more formal proceedings involving a similar question of law or fact to be consolidated for hearing where rights of the parties or the public interest will not be prejudiced by such procedure." *See* Reg. 108-864.[1] It is the Commission, therefore, and not the petitioning parties, that decides whether proceedings will be tried separately or together. *Accord Keels v. Pierce*, 433 S.E.2d 902, 904 (S.C. Ct. App. 1993) ("Consolidation is within the broad discretion of the trial court."). The Petitioning CLECs have failed to take this proper course. Instead, they have taken the liberty of inappropriately filing a petition on behalf of all four.

The second procedural infirmity that the Joint Petition suffers is that a proper Motion for Consideration should contain sufficient facts to allow the Commission to determine whether the requested consolidation would be in the interest of administrative economy, and would otherwise result in a more efficient resolution of the issues than would separate proceedings. *See Keels,*

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[1] Similar provisions appear in both the South Carolina Rules of Civil Procedure and Federal Rules of Civil Procedure. *See* S.C.R.Civ. P. 42(a); Fed. R. Civ. P. 42(a).

433 S.E.2d at 904 ("The moving party has the burden of persuading the court that consolidation is desirable."). *See also* Reg. 108-864 (requiring a showing that "the rights of the parties or the public interest will not be prejudiced by such procedure."). The Petitioners have not only failed to file such a Motion, they have failed to make a sufficient showing to support consolidation.

Specifically, the Petitioners have set forth in the Petition a single paragraph that deals in a very cursory way with their decision to proceed jointly. This paragraph does not contain sufficient information to establish that proceeding on a joint basis is appropriate. Instead, this paragraph states a number of very vague assertions as to why the Petitioners believe this joint approach is appropriate, but little in the way of real facts. Moreover, the facts that are stated do not support consolidation.

The Petitioners, for instance, state that they are filing the Petition jointly because they have negotiated jointly with BellSouth. It is true that these CLECs requested joint negotiations with BellSouth, and for the most part, BellSouth has been able to accede to this request. BellSouth, however, has never agreed to the filing of a Joint Petition, largely because of the various procedural problems with such a filing that are discussed below. To the extent the Petition implies that BellSouth has either agreed to a Joint Petition or waived its right to object, this implication is simply wrong.

The Petition also attempts to justify the joint filing by reference to "the statutory deadline within which the Commission is charged with concluding this arbitration proceeding." (¶ 12). The CLECs, however, also request a waiver of this deadline if they are not allowed to proceed jointly. Moreover, since filing the Joint Petition, the CLECs have jointly moved the Commission to extend the statutory deadline for the Joint Petition they have filed. Thus, the CLECs cannot

legitimately contend that the statutory deadline is an inflexible one, or that a joint proceeding is the only way to meet this deadline.

Beyond this, the CLECs' attempt to support their joint filing with a number of vague assertions that are ultimately insufficient to allow the Commission to determine whether such a filing will result in increased efficiency and economy or in inefficiency and an unduly complicated proceeding. For example, the CLECs state that "to the fullest extent possible, CLECs anticipate the use of a 'team' witness approach." (¶ 12)(emphasis added). Obviously, this extremely vague statement does not constitute a commitment by the CLECs to do anything. Despite what they anticipate at the present, the Petition apparently reserves to the CLECs the option of filing the testimony of four completely independent sets of witnesses to address each of the 107 issues that they raise in their Joint Petition if they later decide that they would prefer to do so. Further, even if things turn out as the CLECs anticipate and they do follow a "team approach," there is still no indication in the Petition as to what this means. For example, the CLECs could decide that their team would best be served by having multiple witnesses provide essentially cumulative testimony on each issue.

Also, the single paragraph of the Petition that addresses the joint approach contains insufficient information to allow the Commission to determine if there is a true unity of interests among the CLECs. The Petition states that the CLECs' interests are not adverse to one another, but does not state that the CLECs' respective positions are the same. Thus, one could assume that the CLECs' team approach would entail multiple witnesses that address the same issue (each on behalf of a different company) in a way that would be "complimentary" to one another, but not adverse.

The point is this: the Commission should not allow the Petitioners to proceed jointly unless they do considerably more than make a vague allusion to an "anticipated" team approach. If the team approach ultimately entails, for example, the testimony of six witnesses for each of the four CLECs, then having a single proceeding in which 24 CLEC witnesses give extended, repetitive testimony would accomplish nothing more than having an extremely unwieldy proceeding. On the other hand, if it is the intention of the CLECs to effectively conduct the arbitration as if they were a single party (and they are willing to commit to this approach), then there may well be some economy in proceeding under the current joint structure. The difficulty is that the CLECs have provided nothing more than extremely vague representations on this point, and certainly what they have presented is an insufficient basis to support the motion to consolidate that they should have made, but did not.

II. TO ADDRESS THESE INFIRMITIES, THE COMMISSION SHOULD EITHER SEVER THIS MATTER INTO FOUR SEPARATE PROCEEDINGS OR ADOPT PROCEDURAL REQUIREMENTS TO ENSURE THAT EFFICIENCY AND ADMINISTRATIVE ECONOMY ARE SERVED RATHER THAN HINDERED.

BellSouth submits that it is appropriate for the Commission to deal with the Petitioners' procedurally inappropriate approach by taking one of two actions: One, the Commission could immediately sever the proceeding into four separate arbitrations. Two, the Commission could allow the Petitioners to continue jointly while adopting procedural requirements to ensure that efficiency and administrative economy is served rather than hindered by this approach.

Specifically, the Commission should require that, if the Petitioners continue to proceed jointly, then their positions must be the same on each issue. In the Petition, the Petitioners appear to state that they are in concert on 97 of the 107 issues, but that there is some variation in their positions on the other issues. (¶ 12). The Petition also appears to suggest that there is no direct conflict on these remaining ten issues, but rather that there are particular issues that some,

but not all, of the CLECs are advancing. However, the Petition simply does not make it clear whether this is the case. The Commission, therefore, should order that the CLECs may only continue with this joint proceeding if their positions on each issue are not only "not adverse," but are, in fact, identical. In other words, although not every CLEC needs to join in raising every issue, those CLECs that do jointly raise a given issue should be required to take the identical position.

Second, the Commission should restrict the joint CLECs to cross examining each BellSouth witness only once. Since the Petition does not address this issue in any way, the CLECs may well take the position that since there are four of them, that they should be entitled to cross each BellSouth witness four times. If this is their intention, then there is little to be gained in the way of administrative economy by having a single proceeding. Thus, the Commission should also order that if the CLECs proceed jointly, then they should be strictly limited to one cross examination of each BellSouth witness.

Third, the Commission should order that if the CLECs continue jointly, then they should be limited to one witness per issue or sub-issue. BellSouth uses the term "sub-issue" advisedly, because there may be instances in which a single issue may require testimony from two or more witnesses with different areas of expertise. For example, there are issues raised by the Petition that involve both policy considerations and technical questions (e.g., feasibility). Even if an arbitration appropriately involved only a single party on each side, multiple witnesses might still be necessary to address this type of issue. The CLECs, however, should not be allowed, for example, to address the policy aspect of a particular issue through the testimony of multiple witnesses. As stated above, in this instance, these witnesses would necessarily either be giving cumulative testimony or expressing differing positions on behalf of their respective employers.

In either event, this approach would not be appropriate in an arbitration proceeding. Therefore, BellSouth requests that the Commission also order that the CLECs' "team" be composed of only a single witness to address each substantive aspect of each issue.

Again, BellSouth would not object to the Joint Petition if it were clear that the CLECs intended to proceed as if they were a single entity. At the same time, BellSouth raised many of the issues addressed above with counsel for the CLECs prior to the Petition being filed, but received no assurances regarding the CLECs' intentions.[2] Likewise, the Petition is, as explained above, extremely vague on certain salient points that this Commission must consider to determine whether a joint proceeding would be appropriate. All of this begs the question of why the CLECs have decided to file a Joint Petition. One would normally assume that if four CLECs have precisely the same position, then one of them would file for arbitration, and the other three would adopt the agreement that results from the arbitration. The fact that the CLECs have opted not to take this approach, combined with the fact that they have been extremely vague in the Petition as to their intentions, certainly raises the prospect of procedural improprieties, or at least difficulties, as this case progresses. BellSouth believes that it is imperative that the Commission act now to avoid a situation in which agency resources would be wasted rather than conserved, and in which this arbitration would devolve into a complicated, multi-part proceeding having too many witnesses and a multiplicity of CLEC positions.

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[2] BellSouth has continued to request that the CLECs discuss these issues since the filing of the Joint Petition but, to date, the CLECs have not yet engaged in such discussions regarding this proceeding.

CONCLUSION

For all of the reasons set forth above, BellSouth respectfully requests the entry of an Order either severing this proceeding into four separate arbitration proceedings or, alternatively, adopting the procedural requirements described above.

Respectfully submitted this 27th day of February, 2004.

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STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
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The undersigned, Jeanette B. Mattison, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused BellSouth Telecommunications, Inc.'s Motion to Sever or To Adopt Procedural Requirements in Docket No. 2004-42-C to be served on the following this February 27, 2004:

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